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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 1171

VILAKETI BLOOMFIELD,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

The petitioner, Vilaketi Bloomfield, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 404 F. 2d 656. A copy of the

opinion is printed in the Appendix. The opinion of the Board of Immigration Appeals is not published. A copy is printed in the Appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was filed and entered on December 19, 1968. Jurisdiction to review the judgment below is conferred upon this Court by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Must petitioner submit in support of his application for status as a permanent resident of the United States the employment certification specified in section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14), or is he exempt from that requirement by reason of section 3 of Public Law 89-732, the Act of November 6, 1966, 80 Stat. 1161.

STATUTES INVOLVED

(Texts are printed in Appendix)

Immigration and Nationality Act, 8 U.S.C. 1101 et seq.

Sec. 101(a)(27), 8 U.S.C. 1101(a)(27)
Sec. 201(b), 8 U.S.C. 1151(b)
Sec. 202(a), 8 U.S.C. 1152(a)

Sec. 203, 8 U.S.C. 1153
Sec. 212(a)(14), 8 U.S.C. 1182(a)(14)
Sec. 245, 8 U.S.C. 1255

Public Law 89-236, Act of October 3, 1965, 79 Stat. 911
Sec. 10, 79 Stat. 917
Sec. 13(b), 79 Stat. 918

Public Law 89-732, Act of November 6, 1966, 80 Stat. 1161
Sec. 3, 80 Stat. 1161

STATEMENT OF THE CASE

This petition seeks review of the order of the United States Court of Appeals for the Ninth Circuit affirming the denial of petitioner's application for status as a permanent resident of the United States. Petitioner's application was considered and rejected by the Immigration and Naturalization Service during the course of deportation proceedings. Jurisdiction of the Court below was invoked pursuant to section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a.

Petitioner is a native and citizen of Tonga, an island kingdom in the South Pacific. He came to the United States for the first and only time on July 9, 1963 and was admitted for a temporary period as a student.

On March 18, 1965, petitioner filed an application for status as a permanent resident pursuant to section

245 of the Immigration and Nationality Act, 8 U.S.C. 1255. His application was denied by the District Director of the Immigration and Naturalization Service, Honolulu, Hawaii, on January 3, 1966. The District Director found petitioner ineligible for permanent resident status on the ground that petitioner needed but did not have the employment certification specified in section 212(a)(14) of the Immigration and Nationality Act, as amended by section 10 of Public Law 89-236, Act of October 3, 1965, 79 Stat. 917. The amendment had become effective on December 1, 1965.

When petitioner failed to maintain his temporary status as a student, proceedings were instituted to deport him from the United States. During the deportation hearing, petitioner renewed his application for permanent resident status, as permitted by 8 C.F.R. 242.17(a). However, his application was again denied for the same reason—his failure to secure the appropriate employment certification.

The Board of Immigration Appeals, which entered the final administrative order of denial, rejected petitioner's claim that he was exempt from the employment certification requirement by reason of section 3 of Public Law 89-732, Act of November 6, 1966, 80 Stat. 1161. The latter exemption, said the Board, applied only to natives of the Western Hemisphere. The Board's order was affirmed by the Court below on December 19, 1968.

REASONS FOR GRANTING THE WRIT

The judgment below discriminates against petitioner by reason of his place of birth. The judgment is incompatible with the letter and spirit of sweeping changes recently made in our immigration laws—changes designed to do away with racial discrimination in the admission of immigrants, not to promote it. The judgment below, therefore, raises an important question of federal law which has not been, but should be, decided by this Court.

Public Law 89-236, the Act of October 3, 1965, 79 Stat. 911, brought about the most significant change in United States immigration policy in more than 30 years, for it abolished the so-called national origins system of immigration under which immigrants had been admitted on the basis of their nationality.

While the new law did not eliminate discrimination entirely, Congress made its intentions perfectly plain. There was to be no further discrimination in the admission of immigrants based upon "race, sex, nationality, place of birth, or place of residence" unless such discrimination was specifically provided for in other parts of the law. Sec. 202(a) of the Immigration and Nationality Act, 8 U.S.C. 1152(a).

The discrimination complained of here is not one of the stated exceptions. Rather, it involves a discrimination in the administration of section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, a discrimination founded solely upon the applicant's place of birth.

At least three other statutes are also involved. The first is section 10 of Public Law 89-236, 79 Stat. 917, which amended section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14). The amendment required certain immigrants who would perform labor in this country to secure an appropriate certification from the Secretary of Labor as a prerequisite to eligibility for permanent resident status.

At the same time, section 13(b) of Public Law 89-236, 79 Stat. 918, by amending section 245(c) of the Immigration and Nationality Act, 8 U.S.C. 1255(c), took away from natives of the Western Hemisphere the right to apply for permanent resident status under section 245. Western Hemisphere natives seeking resident status thereafter would have to apply for immigrant visas at American consular posts abroad. Both of the foregoing statutes became effective on December 1, 1965.

The third statute is section 3 of Public Law 89-732, the Act of November 6, 1966, 80 Stat. 1161. The first clause of the second paragraph of that section restored eligibility under section 245 to natives of the Western Hemisphere who had filed applications prior to December 1, 1965. The second clause provided that as to "all such applications" on file before December 1, 1965, other changes made by Public Law 89-236—including the employment certification requirement—would not apply.

It is petitioner's position that the second clause does not distinguish between natives of the Western

Hemisphere and those born elsewhere. Therefore, he does not need the employment certification to establish his eligibility for permanent resident status.

Dated, San Francisco, California,
March 13, 1969.

Respectfully submitted,
MILTON T. SIMMONS,
DONALD L. UNGAR,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

Vilaketi Bloomfield, Petitioner, vs. Immigration and Naturalization Service, Respondent.	No. 22,214

[December 19, 1968]

On Petition to Review a Final Order of the
Immigration and Naturalization Service

Before: HAMLEY and HAMLIN, Circuit Judges, and PLUMMER, District Judge*

HAMLEY, Circuit Judge:

Vilaketi Bloomfield, a native and citizen of Tonga, has petitioned this court to review an order of the Immigration and Naturalization Service denying his application for status as a permanent resident of the United States.

Bloomfield entered the United States as a non-immigrant student on July 9, 1963. His authorized stay was extended to July 8, 1965. On March 10, 1965, he

*The Honorable Raymond E. Plummer, United States District Judge for the District of Alaska, sitting by designation.

applied for status as a permanent resident, pursuant to section 245 of the Immigration and Nationality Act (Act), 66 Stat. 217 (1952), 8 U.S.C. § 1255 (1964). This application was denied by the district director on January 3, 1966, on the ground that Bloomfield had failed to secure the employment certification required by section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14) (1964), as amended by section 10 of Public Law 89-236, 79 Stat. 917 (1965).

Bloomfield failed to maintain his status as a student. Deportation proceedings against him were therefore commenced, and a hearing before a special inquiry officer was held on May 11, 1966. In that proceeding, Bloomfield admitted all allegations contained in the order to show cause but renewed his application for permanent status. His renewed application was denied by the special inquiry officer for lack of the employment certification specified in section 212(a)(14).

Bloomfield appealed to the Board of Immigration Appeals, contending that he was exempt from the provisions of section 212(a)(14) because he had established a small importing business. See 8 C.F.R. § 212.8(b)(4). The Board remanded the proceedings for further hearing to determine whether he was a self-employed independent contractor exempt from the provisions of the above statute. After a further hearing before the special inquiry officer, the latter once again denied Bloomfield's application, holding that he was ineligible for the self-employment exemption.

On appeal to the Board from that decision, Bloomfield conceded that he could not qualify for the self-employment exemption from the section 212(a)(14) requirement for an employment certification. However, he then contended that he was exempt from that certification requirement by reason of the enactment, on November 2, 1966, of section 3 of Public Law 89-732, 80 Stat. 1161. The Board rejected this argument, holding that only natives of Western Hemisphere countries and adjacent islands were saved from the employment certification requirement by Public Law 89-732.

The Board therefore affirmed the decision of the special inquiry officer denying Bloomfield's application for status as a permanent resident of the United States. This review proceeding was then commenced.

Section 245 of the Act permits an alien who is temporarily in the United States to become, under certain circumstances, a lawful permanent resident. One of the circumstances which must exist is that the alien be admissible to the United States for permanent residence under the Act. Aliens ineligible for admission to the United States for permanent residence, and therefore ineligible for relief under section 245, are specified in section 212 of the Act, 8 U.S.C. § 1182 (1964). On March 10, 1965, when Bloomfield applied for status as a permanent resident, he was not statutorily ineligible for admission under any provision of section 212 as it then read.

However, before the processing of his application was completed, section 212(a)(14) was amended by

section 10 of the Act of October 3, 1965, 79 Stat. 911. As amended, sections 212(a)(14) provided that an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor, shall be ineligible for admission unless he has obtained from the Secretary of Labor a described employment certificate. As indicated above, Bloomfield did not have such a certificate.

Section 245 of the Act, under which Bloomfield applied for a change of status, was also amended by the Act of October 3, 1965. See 79 Stat. 919. Section 13(b) of the latter Act amended section 245(c) to read as follows:

> "The provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere or of any adjacent island named in section 101(b)(5)."[1]

Bloomfield is not a native of the Western Hemisphere or adjacent islands. It follows that section 245(c) of the Act, as amended by section 13(b) of the Act of October 3, 1965, did not exclude him from the provisions of section 245 or exempt him from the related section 212(a)(14) requirement, referred to above, requiring a certificate from the Secretary of Labor.

But section 13 of the Act of October 3, 1965 was, in turn, amended by section 3 of the Act of November

---

[1]Prior to this 1965 amendment of section 245(c), that subsection read as follows:

> "(c) The provisions of this section shall not be applicable to any alien who is a native of any country contiguous to the United States, or of any adjacent island named in section 101(b)(5)."

2, 1966, 80 Stat. 1161. Under this 1966 amendment there was added to section 13 of the 1965 Act a new subsection (c), reading as follows:

> "(c) Nothing contained in subsection (b) of this section shall be construed to affect the validity of any application for adjustment under section 245 filed with the Attorney General prior to December 1, 1965, which would have been valid on that date; but as to all such applications the statutes or parts of statutes repealed or amended by this Act are, unless otherwise specifically provided therein, continued in force and effect."

The last time his case was before the Board, Bloomfield contended that since his application for change of status was filed prior to December 1, 1965, this 1966 amendment of section 13 of the Act of October 3, 1965, adding new subsection (c) thereto, saves his application from the certification requirement of section 212(a)(14), as amended. The Board, however, held that the 1966 amendment of section 13 of the 1965 Act created an exception only for those mentioned in section 13(b) of the 1965 Act, amending section 245(c) of the Act, namely, natives of the Western Hemisphere and adjacent islands, who had filed applications for adjustment of status before December 1, 1965.

This conflict of view as to the construction to be placed upon section 3 of the Act of November 2, 1966, poses the only issue before us in this review proceeding.

We agree with the construction placed upon that section by the Board. The new subsection (c) which

the 1966 Act adds to section 13 of the 1965 Act, begins with the words: "Nothing contained in *subsection (b)* of this section shall be construed to affect the validity of any application. . . ." (Emphasis added.) It is therefore evident that, under this 1966 amendment, the only statutory provisions which were *not* to affect the validity of an application filed prior to December 1, 1965, were those which were contained in subsection (b) of section 13 of the 1965 Act. Those statutory provisions operated only to exclude from the scope of section 245, aliens who are natives of any country of the Western Hemisphere or of any adjacent island—a provision inapplicable to petitioner.

All other statutory provisions which may affect the validity of such an application, including the provision of section 212(a)(14) of the Act, as amended in 1965, which requires an employment certificate, were accordingly left in effect as to all applications whether filed before or after December 1, 1965. This seems so clear to us that we do not perceive the asserted "ambiguity" on the basis of which Bloomfield resorts to the legislative history of the 1966 Act. Nor do we note anything in that history which lends substantial support to his view.

Affirmed.

Aug. 18, 1967

United States Department of Justice
Board of Immigration Appeals

File: A-13551638—Honolulu

In re: Vilaketi Bloomfield

In Deportation Proceedings

Certification

On Behalf of Respondent: Donald L. Ungar, Esq.
517 Washington Street
San Francisco, Calif.
94111

(Brief filed)

Charges:

Order: Section 241(a)(2), I&N Act (8 USC 1251 (a)(12))—Remained longer

Lodged: None

Application: Status as permanent resident under Section 245 of the Immigration and Nationality Act, or, in the alternative, voluntary departure

The respondent, a native and citizen of Tonga, has been found deportable as an alien who after admission as a nonimmigrant student has remained longer than authorized. An order entered by the special inquiry officer on June 29, 1967 grants the respondent the privilege of voluntary departure in lieu of deportation and denies an application for adjustment of status under Section 245 of the Immigration and Nationality Act. The order has been certified for final decision by this Board pursuant to a directive entered

by this Board on October 20, 1966 when the case was originally before us on appeal.

The respondent, an unmarried male alien 22 years of age, was admitted to the United States on July 9, 1963 at the port of Honolulu, Hawaii as a student. He was authorized to remain in the United States until July 8, 1965. He has remained beyond July 8, 1965 and concedes that he is deportable as charged in the Order to Show Cause.

When the case was originally considered in October of 1966 we had before us the issue of whether the respondent was required to submit a certification from the Secretary of Labor pursuant to Section 212(a)(14) of the Act, as amended. The respondent, at that time, alleged that he was self-employed in his own business of importing from Tonga and selling merchandise such as, tapa cloth, kafa, baskets, necklaces, shells and souvenirs. We remanded the case to the special inquiry officer for further hearing because his adverse decision was made prior to the publication of regulations setting forth the class of aliens exempted from obtaining a certification.

Counsel concedes that the evidence developed during the reopened hearing will not support a finding that the respondent is exempt from obtaining a labor certification under 8 CFR 212.8(a)(b) based upon the operation of his own independent business. Counsel maintains, however, that the respondent is exempt from obtaining a labor certification on the ground that he filed his application for adjustment of status prior to December 1, 1965. Counsel argues that the

respondent is not required to secure an employment clearance by reason of the enactment of Public Law 89-732 on November 2, 1966.

We considered a similar contention of counsel in *Matter of Hoeft,* Int. Dec. 1723 (BIA, September 27, 1966 and April 14, 1967). We held that the 1966 amendment of Section 245(c) created an exception only for those mentioned in the section, namely, natives of the Western Hemisphere and adjacent islands, who had filed applications for adjustment of status before December 1, 1965. Since the respondent is not a native of the Western Hemisphere or adjacent islands he is not exempted from obtaining a labor certification.

We will affirm the order entered by the special inquiry officer on June 29, 1967.

ORDER: It is ordered that the order entered by the special inquiry officer on June 29, 1967 granting the respondent voluntary departure in lieu of deportation and denying an application of status under Section 245 of the Immigration and Nationality Act be and the same is hereby affirmed.

Thomas G. Finucane, Chairman

STATUTES INVOLVED

Immigration and Nationality Act, 8 U.S.C. 1101 et seq.

Sec. 101(a)(27), 8 U.S.C. 1101(a)(27)

Section 101. (a) As used in this Act—

* * *

(27) The term "special immigration" means

"(A) an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him: *Provided,* That no immigrant visa shall be issued pursuant to this clause until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(14);

"(B) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

"(C) an immigrant who was a citizen of the United States and may, under section 324(a) or 327 of title III, apply for reacquisition of citizenship;

"(D)(i) an immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the vocation of minister of a religious denomination, and whose services are needed by such religious denomination having a bona fide organization in the United States; and (ii) the spouse or the child of any such immigrant, if accompanying or following to join him; or

"(E) an immigrant who is an employee, or an honorably retired former employee, of the United States government abroad, and who has performed faithful service for a total of fifteen years, or more, and his accompanying spouse and children: *Provided,* That the principal officer of a Foreign Service establishment, in his discretion, shall have recommended the granting of special immigrant status to such alien in exceptional circumstances and the Secretary of State approves such recommendation and finds that it is in the national interest to grant such status."

Section 201(b), 8 U.S.C. 1151(b)

(b) The "immediate relatives referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States; *Provided,* That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Act.

Section 202(a), 8 U.S.C. 1152(a)

Sec. 202. (a) No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in section 101(a)(27), section 201(b), and section 203: *Provided,* That the total number of immigrant visas and the number of conditional entries made available to natives of any single foreign state under paragraphs (1) through (8) of section 203

(a) shall not exceed 20,000 in any fiscal year: *Provided further,* That the foregoing proviso shall not operate to reduce the number of immigrants who may be admitted under the quota of any quota area before June 30, 1968.

Section 203, 8 U.S.C. 1153

Sec. 203. (a) Aliens who are subject to the numerical limitations specified in section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

(1) Visas shall be first made available, in a number not to exceed 20 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are the unmarried sons or daughters of citizens of the United States.

(2) Visas shall next be made available, in a number not to exceed 20 per centum of the number specified in section 201(a)(ii), plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are the spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence.

(3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States.

(4) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), plus any visas not required for the classes specified in para-

graphs (1) through (3), to qualified immigrants who are the married sons or the married daughters of citizens of the United States.

(5) Visas shall next be made available, in a number not to exceed 24 per centum of the number specified in section 201(a)(ii), plus any visas not required for the classes specified in paragraphs (1) through (4), to qualified immigrants who are the brothers or sisters of citizens of the United States.

(6) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

(7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their

application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudia Arabia and Ethiopia on the south: *Provided,* That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

(8) Visas authorized in any fiscal year, less those required for issuance to the classes specified in paragraphs (1) through (6) and less the number of conditional entries and visas made available pursuant to paragraph (7), shall be made available to other qualified immigrants strictly in the chronological order in which they qualify. Waiting lists of applicants shall be maintained in accordance with regulations prescribed by the Secretary of State. No immigrant visa shall be issued to a nonpreference immigrant under this paragraph, or to an immigrant with a preference under paragraph (3) or (6) of this subsection, until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(14).

(9) A spouse or child as defined in section 101 (b)(1) (A), (B), (C), (D), or (E) shall, if not

otherwise entitled to an immigrant status and the immediate issuance of a visa or to conditional entry under paragraphs (1) through (8), be entitled to the same status, and the same order of consideration provided in subsection (b), if accompanying, or following to join, his spouse or parent.

(b) In considering applications for immigrant visas under subsection (a) consideration shall be given to applicants in the order in which the classes of which they are members are listed in subsection (a).

(c) Immigrant visas issued pursuant to paragraphs (1) through (6) of subsection (a) shall be issued to eligible immigrants in the order in which a petition in behalf of each such immigrant is filed with the Attorney General as provided in section 204.

Section 212(a)(14), U.S.C. 1182(a)(14), as amended by section 10, Public Law 89-236, Act of Oct. 3, 1965, 79 Stat. 917.

Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the

United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203 (a) (3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8);

Section 245, 8 U.S.C. 1255, as amended by section 13 (b) Public Law 89-236, Act of Oct. 3, 1965, 79 Stat. 918

Sec. 245. (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the ap-

plication for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or nonpreference visas authorized to be issued under section 203(a) within the class to which the alien is chargeable, for the fiscal year then current.

(c) The provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere or of any adjacent island named in section 101(b)(5).

Section 3, Public Law 89-732, Act of Nov. 6, 1966, 80 Stat. 1161

Sec. 3. Section 13 of the Act entitled "An Act to amend the Immigration and Nationality Act, and for other purposes," approved October 3, 1965 (Public Law 89-236), is amended by adding at the end thereof the following new subsection:

(c) Nothing contained in subsection (b) of this section shall be construed to affect the validity of any application for adjustment under section 245 filed with the Attorney General prior to December 1, 1965, which would have been valid on that date; but as to all such applications the statutes repealed or amended by this Act are, unless otherwise specifically provided therein, continued in force and effect.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1171

VILAKETI BLOOMFIELD, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. i–vi) is reported at 404 F.2d 656.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1968. The petition for a writ of certiorari was filed on March 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, an alien from outside the Western Hemisphere, was properly held not to be exempt from the requirement of obtaining a certificate from

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the Secretary of Labor as a prerequisite to seeking adjustment of his status to that of a permanent resident.

STATEMENT

Petitioner, a citizen of Tonga, an island in the South Pacific, was admitted into the United States as a non-immigrant student on July 9, 1963, at Honolulu, Hawaii. His authorized stay was extended to July 8, 1965. He overstayed this date and failed to maintain his student status. Accordingly, deportation proceedings were commenced against him. At a hearing before a special inquiry officer petitioner conceded deportability and was granted the privilege of voluntary departure.

On March 10, 1965, prior to the institution of the deportation proceedings, petitioner had applied for adjustment of his status to that of a permanent resident pursuant to Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255). This application was denied on January 3, 1966, by the district director on the ground that petitioner had failed to secure the employment certificate from the Secretary of Labor required by Section 212(a)(14), (8 U.S.C. 1182(a)(14)), as amended by Public Law 89–236, effective December 1, 1965 (see Pet. App. xv–xvi).[1] The same application was renewed by petitioner during the de-

[1] Under Section 212(a)(14), as amended, aliens seeking to enter the United States for the purpose of performing labor must obtain an employment certificate from the Secretary of Labor to the effect that qualified workers are not available at the place where the alien intends to work and that the alien's employment would not adversely affect wages and working conditions of domestic persons similarly employed. Aliens tem-

portation proceedings and was denied for the same reason by the special inquiry officer. On appeal to the Board of Immigration Appeals, petitioner argued that he was exempt from the provisions of Section 212(a)(14) by virtue of an amendment to Section 245 (the adjustment of status provision) on November 2, 1966, *viz.*, Public Law 89–732, 80 Stat. 1161 (see Pet. App. xvii). The Board determined that the 1966 amendment was intended to and did exempt only natives of Western Hemisphere countries and adjacent islands who had applied for permanent resident status prior to December 1, 1965. Accordingly, it upheld the denial of petitioner's application for permanent resident status (Pet. App. vii–ix). On petition for review under Section 106(a) (8 U.S.C. 1105a) the court of appeals affirmed on similar grounds (Pet. App. i–vi).

ARGUMENT

The court below correctly concluded that petitioner is not exempt from the requirement for clearance from the Secretary of Labor before qualifying for admission as a permanent resident. The question presented is of limited and diminishing importance, and there is no conflict among the circuits. Thus, further review is not warranted.

Section 212(a)(14)'s requirement for an employment certificate became effective on December 1, 1965. At the same time Congress provided that natives of

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porarily in the United States must, under Section 245, show that they are eligible for admission into the country for permanent residence in order to qualify for discretionary relief—adjustment of status—under that provision (see Pet. App. iii).

the Western Hemisphere were ineligible to have their status adjusted under Section 245 while they were physically present within the United States, in subsection (b) of Section 13 of the 1965 Act (79 Stat. 919), which added subsection (c) to Section 245 (see Pet. App. xvii).[2] This meant that all Western Hemisphere natives, even those whose applications for adjustment were already pending, would, in order to obtain permanent resident status, be required to leave the United States and apply for immigrant visas at some consular office abroad. To alleviate that hardship, Congress, in November 1966, enacted Public Law 89–732, the statute here at issue, which amended subsection (b) of Section 13 of the 1965 Act—*i.e.*, subsection (c) of Section 245—by adding the following provision (80 Stat. 1161):

> Nothing contained in subsection (b) of this section [Section 13 of the 1965 Act] shall be construed to affect the validity of any application for adjustment under section 245 filed with the Attorney General prior to December 1, 1965, which would have been valid on that date; but as to all such applications the statutes or parts of statutes repealed or amended by this Act are, unless otherwise specifically provided therein, continued in force and effect.

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[2] Congress found that many Western Hemisphere natives were entering as non-immigrants and were promptly applying for adjustment of status. See H. Rep. No. 745, 89th Cong., 1st Sess., p. 22; S. Rep. No. 748, 89th Cong., 1st Sess., p. 24.

As the court of appeals reasoned (Pet. (App. v–vi):

> The new subsection (c) which the 1966 Act adds to section 13 of the 1965 Act, begins with the words: "Nothing contained in *subsection* (*b*) of this section shall be construed to affect the validity of any application * * *. (Emphasis added.) It is therefore evident that, under this 1966 amendment, the only statutory provisions which were *not* to affect the validity of an application filed prior to December 1, 1965, were those which were contained in subsection (b) of Section 13 of the 1965 Act. Those statutory provisions operated only to exclude from the scope of section 245, aliens who are natives of any country of the Western Hemisphere or of any adjacent island—a provision inapplicable to petitioner.

In other words, Congress, having in the 1965 Act altered the provisions of Section 245 with respect to natives of the Western Hemisphere by depriving such aliens of the right to seek adjustment of status in the United States, softened the impact of that drastic change by providing in the 1966 amendment that the bar of the 1965 Act would not affect the validity of adjustment of status applications by Western Hemisphere natives which had been filed prior to December 1, 1965.[3] Contrary to petitioner's argument, the

[3] The Board of Immigration Appeals considers that the 1966 amendment had the effect of exempting Western Hemisphere natives from all post-December 1, 1965, statutory requirements

1966 amendment did not purport to relieve non-Western Hemisphere aliens of the requirement of obtaining an employment certificate from the Secretary of Labor pursuant to Section 212(a)(14). Neither its literal language, nor its background and legislative history, supports such a construction. The limited congressional purpose in enacting the 1966 amendment—which is apparent on the face of the provision itself—was explained in a conference report as follows (Conf. Rep. No. 2334 on H.R. 15183, reported in 3 U.S. Code, Cong. & Admin. News, 89th Cong., 2d Sess., p. 3802):

> Section 3 of the Senate amendment provides that any application for adjustment of status under section 245 of the Immigration and Nationality Act filed with the Attorney General prior to December 1, 1965, may be adjudicated *notwithstanding the provisions of section 245 (c) of the Immigration and Nationality Act.* This objective is identical with H.R. 12596, which was approved by the House of Representatives August 1, 1966. The language of the Senate amendment with respect to this provision is slightly different from the House version but accomplishes the same objective. The conferees agree to adopt the Senate provision. [Emphasis added.]

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rather than merely lifting the bar imposed on such aliens from seeking adjustment of their status under Section 245, so long as their application was filed before the December 1, 1965 date. See *Matter of Hoeft*, Int. Dec. 1723 (Sept. 27, 1966 and April 14, 1967), cited at Pet. App. ix. That construction is nonetheless not helpful to petitioner, who is concededly not a native of the Western Hemisphere.

It is thus clear that the 1966 amendment did not eliminate, as to non-Western Hemisphere aliens like petitioner, the requirement of an employment certificate from the Secretary of Labor. Since he lacked such clearance, his application for adjustment of status was properly denied.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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